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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARLO DUKE DURAN,

Defendant and Appellant.

D054625

(Super. Ct. No. RIF125535)

APPEAL from a judgment of the Superior Court of Riverside County, Michele D. Levine, Judge. Affirmed as modified.

I.

INTRODUCTION

A jury found Marlo Duke Duran guilty of stalking (Pen. Code,¹ § 646.9, subd. (a)) (count 1), making a criminal threat as to victim Anita C. (Anita) (§ 422) (count 2), making a criminal threat as to victim Donna S. (§ 422) (count 3), making annoying

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

telephone calls (§ 653m, subd. (a)) (count 4), and violating a protective order (§ 273, subd. (a)) (count 5).² After the jury returned its verdict, Duran admitted having suffered two prior strike convictions (§§ 667, subds. (c), (e)(2)(a), 1170.12, subd. (c)(2)(A)) and a prison prior (§ 667.5, subd. (b)). The trial court sentenced Duran to 25 years to life on count 1 and 25 years to life on count 3, to be served consecutively to the sentence on count 1. In addition, the court sentenced Duran to 365 days on count 4, to be served consecutively to the terms imposed on counts 1 and 3, and 365 days on count 5. The court specified that the term on count 5 be served concurrently to that imposed on count 4. The court also imposed a one-year sentence for the prison prior, to be served consecutively to the terms imposed on counts 1, 3, 4, and 5. The court imposed a sentence of 25 years to life on count 2, but stayed execution pursuant to section 654. The court sentenced Duran to a total aggregate term of 51 years to life in prison, plus an additional one year in any penal institution.

On appeal, Duran claims that there is insufficient evidence in the record to support his convictions on counts 1, 2, and 3. In addition, Duran claims that the trial court erred in admitting evidence of his commission of uncharged acts of domestic violence upon his former wife pursuant to Evidence Code section 1109. Duran also claims that the trial court erred in failing to instruct the jury on count 3 regarding the lesser included offense of attempted criminal threat. Finally, Duran claims that the trial court erred in failing to stay execution of the sentences imposed for making annoying telephone calls (§ 653m,

² The information and verdict form refer to the victim in count 2 as "Jane Doe." However, Anita testified at trial using her true name.

subd. (a)) (count 4) and violating a protective order (§ 273.6) (count 5), pursuant to section 654. The People concede that the trial court erred in failing to stay execution of the sentences on counts 4 and 5 pursuant to section 654. We accept the People's concession on Duran's claim of sentencing error and order the judgment modified. We reject the remainder of Duran's contentions, and affirm the judgment as so modified.

II.

FACTUAL BACKGROUND

A. *The People's evidence*

Anita and Duran began dating in 1999. They moved in together in 2000, and married in 2004. Near the end of July 2005, the couple separated, and Duran moved out of the apartment in which they had been living.

After their separation, Duran engaged in a series of threatening and harassing acts directed at Anita (count 1). Duran repeatedly called and e-mailed Anita, frequently calling her derogatory names and making other harassing comments. He surreptitiously entered Anita's residence and her truck without her permission, threatened Anita and those close to her, and violated a restraining order that Anita obtained against him. During one telephone call, Duran told Anita that she had better "watch her back" (count 2). In a second telephone call, Duran told Anita's mother, Donna S., that "he would do the bitch [Anita] in before he would go back to jail" (count 3).³

³ We discuss in greater detail the evidence pertaining to counts 1, 2, and 3, in part III.A., *post*, in our consideration of Duran's sufficiency claims as to these three counts.

After having been served with the restraining order, Duran continued to place telephone calls to Anita (count 4, 5) and contacted her in person at her residence (count 5).

The People also presented evidence of Duran's commission of various uncharged acts of domestic violence against Anita and against Duran's former wife, Alissa C. (Alissa). (See pt. III.B., *post.*)

B. *Defense evidence*

Duran's former employer testified that Anita frequently called and visited Duran at his workplace between November 2004 and July 2005. Duran's niece testified that Duran lived with her during August of 2005, and that during this period, Anita called Duran, visited him, and drove by the house where Duran was staying. A defense investigator testified that Anita told him that she had "exaggerated and embellished" information that she provided to the police regarding Duran's conduct.

III.

DISCUSSION

A. *The record contains sufficient evidence to support Duran's convictions on counts 1, 2, and 3*

Duran claims that there is insufficient evidence to support his convictions for making a criminal threat against Anita (§ 422) (count 2), making a criminal threat against Donna S. (§ 422) (count 3), and stalking (§ 646.9, subd. (a)) (count 1).⁴

1. *Standard of review*

In determining the sufficiency of the evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

⁴ We first address Duran's contentions as to the criminal threat counts (counts 2 and 3), since much of the evidence related to these counts is also relevant to the stalking count (count 1).

2. *Governing law*

a. *Making a criminal threat*

Section 422 provides in relevant part:

"Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

"For the purposes of this section, 'immediate family' means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

"'Electronic communication device' includes, but is not limited to, telephones"

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat — which may be 'made verbally, in writing, or by means of an electronic communication device' — was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal,

unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances. [Citation]." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 [quoting and summarizing the elements of making a criminal threat (§ 422)].)

b. *Stalking*

Section 646.9 provides in relevant part:

"(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

[¶] . . . [¶]

"(e) For the purposes of this section, 'harasses' means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.

"(f) For the purposes of this section, 'course of conduct' means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct.'

"(g) For the purposes of this section, 'credible threat' means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or

her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of 'credible threat.'"

In order to prove the crime of stalking, the People must demonstrate that the defendant (1) followed or harassed another person; (2) made a credible threat; and (3) intended to place the victim in reasonable fear for her safety. (See *People v. Uecker* (2009) 172 Cal.App.4th 583, 593 [summarizing elements of the offense of stalking (§ 646.9, subd. (a))].

3. *Application*

a. *Count 2*

(i) *Factual background*

Anita testified that she contacted the police on August 11, 2005 because Duran had placed several harassing and threatening telephone calls to her. When asked about the telephone calls, Anita testified as follows:

"[The prosecutor]: Did he call you names?

"[Anita]: Yes.

"[The prosecutor]: Did he threaten you?

"[Anita]: Yes.

"[The prosecutor]: He called you a bitch?

"[Anita]: Yeah.

"[The prosecutor]: What other names did he call you?

"[Anita]: Um, a whore.

"[The prosecutor]: And how did he threaten you?

"[Anita]: He said he was going to kick my ass or something."

In addition to Anita's testimony, Corona Police Department Officer Gail Gottfried testified regarding the description that Anita gave her concerning the August 11 telephone calls.⁵ According to Officer Gottfried's testimony, Duran called Anita about a ring that he wanted her to return to him. Anita told Duran that she did not have the ring. Duran responded, "Bitch, watch your back." Anita told Duran that he was not supposed to be calling her and hung up. Duran immediately called back. When Anita answered, Duran said, "You dumb bitch. You better watch your ass." Duran also began talking about "a girl" that he had met. Anita again hung up, and Duran called back. This time, Anita did not answer. Duran left a message, which Anita played for Officer Gottfried. In the message, Duran said, among other things, "Don't fuck around no more, Anita." The prosecutor asked Officer Gottfried, "And then he [Duran] also said something about sending people over and, 'Quit acting stupid;' is that right?" Officer Gottfried responded in the affirmative, and testified that Duran sounded angry in the recorded message.

⁵ At trial, Anita testified that she still loves Duran and that she would like him to be involved in her life. Throughout her testimony, Anita repeatedly stated that she could not recall various events that were at issue in the trial. The trial court found that Anita was "somewhat hostile to the People in her failures to recollect." For this reason, the court permitted the People to present a considerable amount of evidence of Duran's actions in the form of Anita's prior inconsistent statements. Duran raises no claim on appeal pertaining to the admission of these statements.

In addition to the evidence pertaining directly to the August 11 threats that formed the basis of count 2, the People presented evidence that on that same day, Duran sent a total of 10 e-mails to Anita. In the e-mails, Duran accused Anita of "cheating and lying," threatened to distribute "private and non-flattering photographs of her," referred to her as a "freak," and told her "not to play games."⁶

The People also presented evidence that Duran personally went to Anita's residence on August 11.⁷ Anita testified that she arrived home from work earlier than unusual that day. When she got to her apartment, Anita was surprised to see Duran and his niece outside of her apartment. Anita got out of her truck and told Duran to leave. He refused. When Anita attempted to leave, Duran grabbed at the door of her truck. As Anita started to call the police on her cellular telephone, Duran left the area. When Anita eventually entered her apartment, she discovered that the door to the apartment was open, and that one of her negligees and some videos were outside. Anita also discovered that Duran had been checking numbers on her home telephone, apparently for the purpose of discovering whom she had been calling. A police officer who responded to the scene described Anita as "visibly upset."

⁶ Although Duran describes the e-mails in his brief, he has not transmitted to this court the exhibits that contain the e-mails. (See Cal. Rules of Court, rules 8.320(e), 8.224.) We assume for purposes of this decision that the emails are as Duran describes them in his brief, from which we quote in the text.

⁷ The prosecutor asked Anita if this incident occurred "on or about August 11, 2005"

Anita testified that she went to her ex-husband's house that night to spend the night. Anita testified that she did so "to get away from the phone calls and stuff." The prosecutor asked Anita, "Were you afraid for your safety?" Anita responded, "I believe at the time, yeah."

The People also presented evidence of Duran's prior commission of domestic violence upon Anita, including threatening to kill her, and, on a separate occasion, suffocating her for nearly 20 seconds with a pillow. (See fn. 17, *post.*)

(ii) *The record contains sufficient evidence of each of the elements of section 422 to support Duran's conviction on count 2 for making a criminal threat*

Duran appears to raise challenges to the sufficiency of the evidence as to each of the elements of section 422. Accordingly, we consider Duran's contentions regarding the purported insufficiency of each as to the elements.

With respect to the first element — threatening a crime that will result in death or great bodily injury — the People presented evidence that Duran told Anita to "watch her back" and "watch her ass." Anita testified that Duran told her that he was going to "kick her ass." In addition, according to Officer Gottfried, Duran made a subsequent reference in a telephone message to "sending people over." Assuming for the sake of argument that Duran's statements were "ambiguous," as he maintains, they were sufficiently clear to support a conviction for making a criminal threat (§ 422) when viewed in context with Duran's other harassing and threatening conduct that occurred that same day, as well as his prior commission of domestic violence upon Anita. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860 [stating "'the circumstances under which the threat is made . . . give

meaning to the actual words used,' and '[e]ven an ambiguous statement may be a basis for a violation of section 422"'[.]) Similarly, with respect to the second element — Duran's specific intent that his statements be taken as a threat — the jury could consider the totality of Duran's threatening conduct on or about August 11, and reasonably find that Duran harbored the specific intent that his statements be taken as a threat.

The jury could also have reasonably considered Duran's related conduct and his past threatening conduct in determining whether his threats carried "an immediate prospect of execution" (§ 422; compare with *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1138 [finding immediacy element lacking where "there was no evidence in this case to suggest that appellant and [victim] had any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the other"].) More specifically, Duran's reference to "sending people over," and his surreptitiously entering Anita's apartment constitute evidence that the jury could have found supported the immediacy element of section 422.

With respect to the element of causing the victim to be in sustained fear, Anita's testimony that Duran's actions caused her to spend the night away from her home, and her action in calling the police based on Duran's threatening behavior, constitutes evidence that Anita suffered sustained fear from Duran's conduct. We reject Duran's argument that there is insufficient evidence that Anita suffered sustained fear because Anita "confronted [Duran] by herself" on the day after Duran made the threats. The incident to which Duran refers occurred when Duran went to Anita's ex-husband's residence the following day and began yelling outside the residence. The fact that Anita

came out of her ex-husband's residence to speak to Duran does not establish that Anita did not suffer fear. Further, the jury could have inferred that Anita's ex-husband was nearby at the time that Anita went outside to speak to Duran. A responding police officer testified that he interpreted Duran's threat — "I'm going to kill him" — as being directed at Anita's ex-husband because the ex-husband was "the only other male subject at the residence." We also reject Duran's argument that there is insufficient evidence that Anita suffered sustained fear merely because Anita did not specifically mention Duran's threats in a letter that she wrote to the Victim Witness Assistance Program on August 16, 2005.⁸

With respect to the final element, Anita's fear was reasonable in light of the words Duran used to threaten her, his other harassing and threatening conduct occurring near the time of the incident, and Duran's history of committing domestic violence upon Anita.

b. *Count 3*

(i) *Factual background*

Donna S., Anita's mother, testified that Duran called her on the telephone in August 2005. Duran began the conversation by saying, "Don't hang up on me." Donna S. remained on the line. Duran told Donna S. that Anita was getting drugs from a "girl that she used to live with," rather than from him, and said that Anita was sick from prescription drugs. Duran asked Donna S. to get Anita to talk to him. Donna S.

⁸ Duran acknowledges that Anita states in the letter that "she received a restraining order against him because he stalks [fn. omitted] her and constantly harasses her" Although Duran describes the letter in his brief, he has not transmitted to this court the exhibit that contained the letter. (See Cal. Rules of Court, rules 8.320(e), 8.224.) We assume for purposes of this decision that Duran's description of the letter in his brief is accurate.

responded by telling Duran to stay away from Anita. Donna S. told Duran that she and Anita had obtained a restraining order against him, and said that he would go back to jail if he contacted Anita. According to Donna S., Duran responded that "he would do the bitch [Anita] in before he would go back to jail." Donna S. hung up on Duran.

Donna S. testified that Duran's comment caused her to feel "scared" for Anita and that she understood Duran to mean that "he would hurt [Anita]." When the prosecutor asked Donna S. whether she believed that Duran would actually hurt Anita, Donna S. responded in the affirmative. Donna S. explained that she had previously seen "bruises on [Anita's] neck, bruises on her arm, and bruises on her breasts," that Donna S. attributed to Duran's actions.⁹

Donna S. testified that immediately after this conversation with Duran, she called Anita to inform her of Duran's threat. According to Donna S., when Anita learned of the threat, she "was scared." Donna S. asked Anita to come her house, but Anita refused. The following morning, Donna S. telephoned Anita. When Anita did not answer the telephone, Donna S. called the police.

(ii) The record contains sufficient evidence of each of the elements of section 422 to support Duran's conviction on count 3

Because Duran appears to challenge the sufficiency of the evidence as to each of the elements of section 422, we consider his contentions regarding the purported insufficiency of each of the elements.

⁹ On redirect examination, Donna S. testified that in August of 2000 Duran had told Donna S. that he would kill her because she would not let him talk to Anita.

First, the People were required to prove that Duran "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person." (§ 422.) As noted above, Donna S. testified that she had a telephone conversation with Duran in which Duran told her that "he would do the bitch [Anita] in before he would go back to jail." Donna S. testified that she understood Duran to mean that "he would hurt [Anita]." While Duran contends that the words "do her in" could mean many different things, including tarnishing Anita's reputation or damaging Anita's property, a jury could have reasonably found that Duran willfully used the words to convey a threat to seriously physically injure or kill Anita. (See *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221 (*Martinez*) [defendants' threats are "not subject to protection on the basis that they were couched in ambiguous terms"].)

Duran also contends that the surrounding circumstances demonstrate that he made the threats "during an emotional outburst," and, that the jury therefore could not have reasonably found that he had the specific intent that the statement be taken as a threat. While we are aware of case law stating that "[s]ection 422 was not enacted to punish emotional outbursts, it targets only those who try to instill fear in others" (*People v. Felix* (2001) 92 Cal.App.4th 905, 913), it is certainly possible for a defendant to attempt to instill fear in others while the defendant is in an emotional and aggravated state. (*Martinez, supra*, 53 Cal.App.4th at p. 1221 [relying on the fact that "defendant was extremely angry," and was "cursing" as evidence demonstrating that defendant harbored requisite intent for criminal threat conviction].) The People presented ample evidence that Duran frequently threatened people while he was in an angry and agitated state,

including Donna S., Anita, Anita's ex-husband, and his former wife, Alissa. In light of this evidence, as well as the nature of the language of the threat itself, the jury could reasonably have found that Duran intended that his statement to Donna S. be taken as a threat.

The People were also required to demonstrate that the threat was "so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat" (§ 422.) In an apparent challenge to the sufficiency of the evidence as to this element, Duran notes that he did not make the threat in person, and that the threat was not accompanied by a show of force.

The People presented evidence that Duran had little trouble making personal contact with Anita during the relevant time period and that he had committed violence upon Anita in the past. Accordingly, we conclude that there is sufficient evidence of this element to support Duran's conviction. (*In re Ryan D.*, *supra*, 100 Cal.App.4th at p. 861 ["To constitute a criminal threat, a communication need not be *absolutely* unequivocal, unconditional, immediate, and specific. The statute includes the qualifier 'so' unequivocal, etc., which establishes that the test is whether, in light of the surrounding circumstances, the communication was *sufficiently* unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution"].)

In addition, the People were required to prove that the threat caused Donna S. "to be in sustained fear for . . . her own safety or for . . . her immediate family's safety. . . ."

Donna S. testified that the threat caused her to be "scared." Her actions in immediately calling Anita to warn her of the threat and calling the police the following day corroborate her testimony that Duran's threat caused her to be fearful. Finally, Donna S.'s fear was plainly reasonable in light of the seriousness of the threat, her knowledge that Anita had obtained a restraining order against Duran, and Donna S.'s belief that Duran had committed violence upon Anita in the past.

Accordingly, we conclude that there is sufficient evidence to support Duran's conviction for making a criminal threat, as charged in count 3.

c. *Count 1*

Duran argues that the evidence is not sufficient to support any of the elements of his stalking conviction on count 1. We consider the evidence pertaining to each element.

Among the ample evidence in the record that Duran willfully and maliciously harassed Anita is the following.¹⁰ In early August 2005, Duran repeatedly called Anita on the telephone.¹¹ During some of these calls, Duran called Anita derogatory names and threatened her. Duran also repeatedly sent e-mails to Anita in which he called her names and made threatening comments. Duran entered Anita's apartment when she was not home, without her permission, and checked her telephone to find out what numbers

¹⁰ In light of our conclusion that the People presented sufficient evidence that Duran "willfully and maliciously harassed[d]" Anita within the meaning of the stalking statute, we need not consider whether the People also satisfied the alternatively worded first element of section 646.9, subdivision (a) by demonstrating that he "willfully, maliciously, and repeatedly follow[ed]" her.

¹¹ For example, Anita testified that Duran called her 13 times on August 7th.

she had been calling. He also put one of her negligees and some videos outside the apartment. On another occasion, he surreptitiously entered her truck, leaving cigarette ashes on the seat. On still another occasion, Duran confronted Anita at her ex-husband's residence and told her that he was going to kill her ex-husband. On another day, Duran went to Anita's residence, notwithstanding that the day before he had been served with a restraining order prohibiting him from having contact with her.

Focusing on the statutory definition of "harasses," in section 646.9, subdivision (a), Duran claims that the evidence did not demonstrate that his conduct "seriously alarm[ed], annoy[ed], torment[ed], or terrorize[d]" Anita, and/or that his actions served "no legitimate purpose." We disagree. With respect to the injury element, Anita testified that several of Duran's telephone calls were harassing in nature, and that many of his emails were "upsetting" to her. Duran's actions led Anita to obtain a restraining order and to contact the police on several occasions during the relevant time period. In addition, Anita testified that she spent the night away from her home because Duran's actions caused her to fear for her safety. The jury could clearly infer that Anita suffered the requisite injury. For the same reasons, the jury could have reasonably inferred that Duran's conduct did not serve any legitimate purpose, notwithstanding Duran's claim that his conduct served the legitimate purpose of attempting to achieve a reconciliation in his relationship with Anita.

With respect to the threat and intent elements of section 646.9, subdivision (a), Anita agreed with the prosecutor that Duran had "threatened her."¹² As described in greater detail in part III.A.3.a., *ante*, Duran told Anita that she had better "watch her back" and that he was going to "kick her ass." In addition, as described in greater detail in part III.A.3.b., *ante*, Duran told Anita's mother that "he would do the bitch [Anita] in before he would go back to jail." We conclude that the People presented sufficient evidence that Duran made a credible threat intending to place Anita in reasonable fear for her safety.

We reject Duran's contention that that it is "clear" that "his statements were not intended to place Anita in fear." The words of the threats themselves constitute sufficient evidence for the jury to have found that Duran intended to place Anita in fear by uttering them. The jury also could have considered Duran's other related harassing conduct, described above, in finding that Duran intended to place Anita in fear with his threats. Further, in considering Duran's intent, the jury could have considered evidence that Duran had previously committed domestic violence against both Anita and Alissa, as discussed in part III.C. *post*.

¹² In order to prove a violation of section 646.9, subdivision (a), the People were required to demonstrate that Duran made "a credible threat with the intent to place that person in reasonable fear for his or her safety." Included in the statutory definition of "credible threat" is the requirement that the threat be "made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family." (§ 649, subd. (g).)

We similarly reject Duran's argument that the record contains insufficient evidence that the threats caused Anita to fear for her safety.¹³ As noted above, in addition to other evidence of Anita's fear, Anita testified that she spent the night away from her home on one occasion because she feared for her safety. We reject Duran's argument that the record contains insufficient evidence that Duran's threats caused Anita to experience fear because she "clarified" at trial that the "main reason" she stayed away from her house was to "get some sleep because she was stressed and exhausted" rather than because she feared for her safety.

Accordingly, we conclude that there is sufficient evidence to support Duran's conviction for stalking on count 1.

B. *The trial court did not abuse its discretion in admitting evidence of Duran's commission of uncharged acts of domestic violence upon his former wife pursuant to Evidence Code section 1109*

Duran claims that the trial court erred in admitting evidence of his commission of uncharged acts of domestic violence against his former wife, Alissa, pursuant to Evidence Code section 1109. Specifically, Duran claims that the trial court should have excluded the evidence pursuant to Evidence Code section 352. We apply the abuse of discretion

¹³ We assume for the sake of argument that the People were required to demonstrate that Anita *actually* suffered fear as a result of Duran's threats. However, the statutory definition is ambiguous in this regard in that it requires that the defendant have made the threat, "with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family." (§ 646.9, subd. (g).)

standard of review to this claim. (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1313-1314.)¹⁴

1. *Factual and procedural background*

In July 2007, during a pretrial hearing, defense counsel stated that the prosecutor had indicated that he intended to present evidence of Duran's commission of uncharged acts of domestic violence against his former wife, Alissa, pursuant to Evidence Code section 1109. Defense counsel raised an objection to the introduction of the evidence pursuant to Evidence Code section 352. Defense counsel argued that the probative value of the evidence would be outweighed by the likelihood of undue prejudice because evidence of Duran's commission of domestic violence against Alissa would not help the jury determine whether Duran committed the charged offenses against Anita. Defense counsel also noted that some of the uncharged offenses occurred more than 10 years before the charged offenses. The court stated that it would consider the issue further at a hearing later that afternoon.

At the afternoon hearing, the parties discussed a September 2005 police report that documented statements Alissa made concerning Duran's commission of domestic

¹⁴ The trial court also admitted the evidence pursuant to Evidence Code section 1101, subdivision (b), to prove Duran's intent, motive, and common plan or scheme in committing the charge offenses. Duran raises no argument on appeal that the court erred in admitting the evidence for these purposes. Nor does Duran argue that the court erred in failing to limit the admission of the evidence to these purposes. Under these circumstances, it would appear that any assumed error that the trial court committed in admitting the evidence pursuant to Evidence Code section 1109 would necessarily be harmless. However, we need not resolve this issue in light of our conclusion that the trial court did not abuse its discretion in admitting the evidence pursuant to Evidence Code section 1109.

violence upon her. The court noted that the report indicated that Alissa and Duran had been involved in a relationship since at least 1991, and that they were married between 1995 and 2001. The report indicated that Duran committed various acts of physical abuse upon Alissa between 1991 and 2000. The court questioned whether the prosecutor intended to rely on any instances of domestic violence that had occurred more than 10 years prior to the August 2005 charged offenses.

The prosecutor responded by saying, "If we look at these instances and only take it back as far as 1998, these are clearly instances where Mr. Duran is using force, violence, and threats of violence to control and dominate his partner. In this instance it's [Alissa]. And that is the gist of the [section] 422 as well as the [section] 646.9 crimes." The prosecutor argued that the evidence was admissible to demonstrate Duran's propensity to engage in such conduct and referred to several cases upholding the admissibility of similar evidence pursuant to Evidence Code 1109. The prosecutor indicated that he was requesting that the court admit all of the evidence of Duran's commission of domestic violence upon Alissa, including those instances that occurred more than 10 years prior to the charged offenses.

The court stated that it was the court's tentative conclusion that evidence of Duran's commission of domestic violence upon Alissa beginning in 1998 would be admitted, but that the court would exclude earlier instances. However, the court stated that it would need additional information regarding the evidence before making a final ruling on its admissibility. Citing *People v. Falsetta* (1999) 21 Cal.4th 903, the court stated that it would consider factors such as the "nature of the offense or the actions, the

relevance, the possible remoteness, the degree of certainty of its commission, the likelihood of confusing, misleading, or distracting the jurors from the main inquiry, its similarity to the charged offenses, its likely prejudicial impact of the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternative[s] to its outright admission[]" Specifically, the court indicated that it was interested in the "reliability of the information, whether or not it was reported, et cetera" The court suggested that there had to be "some independent conversation with [Alissa] that documents what it is she would be testifying to at this point in time" The prosecutor indicated that he would have an investigator speak with Alissa regarding the issues that the court had raised.

Defense counsel restated his objection under Evidence Code section 352. Counsel reiterated his argument that the evidence had minimal probative value because Alissa was not the victim of the charged offenses. After further discussion concerning the evidence, the court said that it was also inclined to exclude any evidence of Duran's commission of domestic violence upon Alissa in the presence of children under Evidence Code section 352, in light of its potential prejudicial effect.

The prosecutor indicated that he would provide the court with an additional report concerning Alissa's proposed testimony as soon as possible. The court stated that it would return to the issue the following Monday.

The following Monday, during another pretrial hearing, the court stated that it had reviewed some additional case law regarding the admissibility of evidence pursuant to Evidence Code section 1109. The court had also reviewed a letter that Alissa provided to

police in which she documented Duran's commission of domestic violence upon her between December 1990 and March 2000. The court stated that it would not make a final ruling on the admissibility of the evidence concerning Duran's commission of domestic violence upon Alissa until it received a "follow-up investigation or report" from the prosecutor regarding "its reliability." However, the court summarized the evidence and provided a tentative ruling regarding its admissibility, as follows:

"[Alissa] indicates in July of 1998 that [Duran] hit her in the head. In October of 1998, that he kicked her in the leg, in November of 1999, that he choked her until she almost blacked out; in November of 1999, that while she was carrying her child, he pulled her to the ground with her daughter in her arms; in March of 2000, that he broke the driver's side window with his head and dragged her out of the car and punched her; and then in April of 2000, that he called her repeatedly and threatened to harm her.

"There are other instances that are set forth in the document that occurred before 1998. The court believes that those are remote and would be excessively cumulative of the documentation of the abuse [Alissa] allegedly suffered at the hands of Mr. Duran.

"This Court does believe, under the authorities that I've mentioned previously, that the evidence concerning [Alissa], again, documents very clearly the dynamics of domestic violence that he appears to exhibit with the women that he is involved with. [¶] The incident occurring in July of 1998, October 1998, November of 1999, March 17th of 2000, and April of 2000 appear to be much more probative than they are prejudicial."

Two days later, during another pretrial hearing, the court stated that it had received an additional report from the prosecutor detailing Alissa's allegations regarding Duran's commission of domestic violence upon her. The court stated that it was confirming its tentative ruling that evidence of Duran's commission of domestic violence upon Alissa beginning in 1998 would be admissible, except for one incident in which Alissa was

holding her four-year-old daughter. The court stated that it would exclude the incidents of domestic violence that occurred before 1998 and the incident that involved Alissa's four-year old child under Evidence Code section 352.

At trial, Alissa testified that Duran had committed several instances of domestic violence upon her between July 1998 and April 2000. In July 1998, while Duran and Alissa were traveling together on a company trip, Duran became angry with Alissa while they were at a casino. Duran yelled at Alissa in the casino and called her a "stupid bitch." After Duran and Alissa returned to their hotel room, Duran hit Alissa, causing her to fall over the bed.

In October of 1998, Duran kicked Alissa in the calf, causing her to fall as she was carrying groceries into their house.

In November 1999, Duran began screaming and yelling at Alissa during an argument at their house. Duran put his hand around Alissa's throat and pushed her up against the wall. Duran squeezed Alissa's neck, causing her to have difficulty breathing and to fear for her life.

In March of 2000, Duran and Alissa attended a party at the home of Duran's employer. Alissa left the party without Duran and got into her truck. The windows on the truck were rolled up. Duran came out of the party and angrily told Alissa to get out of the truck. When she refused, Duran hit the window of the driver's side door with his head. The window shattered on Alissa. Duran then opened the door, pulled Alissa out of the truck by her hair, and punched her twice in the face. A few minutes later, Duran told Alissa to get in the truck. Alissa complied and Duran drove the truck away, striking

Alissa again in the face as he was driving. Duran began to drive at approximately 100 miles per hour and stated, "We could just drive off a cliff right now." Alissa feared for her life.

Alissa separated from Duran on March 31, 2000. Shortly after they separated, Duran repeatedly threatened Alissa. Alissa described the threats as follows:

"He called and told me he was going to O.J. me. He called me at my work and said he was going to put a bullet in my head. He called my mom's house . . . and he called, said 'I have a gun. I'm coming over,' and he would hang up. He said he was going to cut me from my neck to my privates."

2. *Governing law*

Evidence Code section 1109 provides in relevant part:

"(a)(1) Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352.

"(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

"(f) Evidence of the findings and determinations of administrative agencies regulating the conduct of health facilities licensed under Section 1250 of the Health and Safety Code is inadmissible under this section."¹⁵

¹⁵ Evidence Code section 1101, subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Evidence Code section 352 provides:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

"The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

Evidence of prior domestic abuse that bears a "similarity . . . to the offense charged," increases its probative value, particularly if it demonstrates a "pattern of abuse." (*People v. Jennings, supra*, 81 Cal.App.4th at p. 1316.) Among the factors that are relevant in determining the likelihood of prejudice are "whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s). [Citations.]" (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.) In addition, whether the uncharged offense evidence is time consuming to present is also a relevant factor in determining the likelihood of prejudice. (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 706 (*Cabrera*) [uncharged offense "testimony was not unnecessarily time consuming and only took up a total of 97 pages of the reporter's transcript"].)

3. *Application*

Duran's abuse of Alissa bore similarities to his conduct in committing the charged offenses against Anita.¹⁶ Each of the women was married to Duran, and his conduct arose in the context of their intimate relationships with him. Thus, although the identity of the victims in the uncharged and charged offenses was different, the two women had similar relationships with Duran, increasing the probative value of the evidence. (*Cabrera, supra*, 152 Cal.App.4th at p. 705 [concluding trial court did not abuse its discretion in admitting testimony from appellant's two girlfriends regarding acts of domestic violence].)

Duran used threats, belittling language, and intimidating behaviors with both women. With respect to threatening behavior, Alissa testified that after their separation, Duran threatened her with serious physical violence. The People presented evidence that Duran similarly told Anita after their separation, "Bitch, watch your back," and that he was going to "kick [her] ass." With respect to belittling language, Alissa testified that Duran was "always call[ing] me names." The People presented evidence that Duran frequently called Anita derogatory names, including "bitch" and "whore."

With regard to intimidation, after they separated, Alissa testified that Duran, "would knock on the windows [of her house] and just yell and scream" In addition, Duran would "yell at [Alissa's] neighbors and scream out obscenities at them." The People presented evidence that after Duran separated from Anita, he learned that Anita

¹⁶ Duran focuses, as shall we, on the similarities (or lack thereof) between the charged offenses against Anita, and the uncharged offense against Alissa.

was at her ex-husband's home, went to the ex-husband's residence, and began yelling. While at the residence, Duran said to Anita, "Fuck you. I'm going to kill him." In sum, the evidence of the charged and uncharged offenses bore significant similarities, and demonstrated a "pattern of abuse." (*People v. Jennings, supra*, 81 Cal.App.4th at p. 1316.)

The record also indicates that the trial court carefully considered whether to admit the evidence of uncharged acts, and that the court exercised its discretion to exclude portions of the uncharged offense evidence that it deemed particularly likely to inflame the jury. As limited by the trial court, the uncharged offenses were not particularly remote in time — the earliest incident having occurred approximately seven years prior to the charged offenses. In addition, Alissa's testimony was not particularly time consuming to present. Her examination comprised a total of 64 pages of the reporter's transcript. Further, we see no potential for confusion on the part of the jury regarding the uncharged and charged offenses, since they involved different victims.

We reject Duran's argument that the evidence pertaining to Alissa was inadmissible because the relationship that he had with Anita was purportedly "entirely dissimilar" to his relationship with Alissa. Assuming the relevance of such a comparison of relationships in the context of an Evidence Code section 352 analysis, the similarities between the charged and uncharged offenses demonstrate that the relationships shared

significant characteristics. Duran acknowledges that his relationship with Anita was "clearly volatile." The same could be said with respect to his relationship with Alissa.¹⁷

We reject Duran's argument that the evidence had minimal probative value because the defense never contested that "[Duran] made multiple phone calls to [Anita], sent her numerous e-mails, or violated a restraining order." The propensity evidence had significant probative value with respect to the hotly contested issue of Duran's state of mind in making the various threats.

Duran is correct that the fact that the uncharged offenses against Alissa included acts of physical violence, and in that sense were more inflammatory than the charged offenses, increased the potential for undue prejudice. There was no evidence that Duran had been punished for the prior uncharged acts, thereby raising a concern that the jury might be tempted to convict him of the charged offenses to punish him for the uncharged offenses. However, we cannot say that the trial court abused its discretion in concluding that these factors did not require exclusion of the evidence pursuant to Evidence Code section 352.

Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence of Duran's commission of uncharged acts of domestic violence upon Alissa pursuant to Evidence Code section 1109.

¹⁷ The trial court also allowed the People to present uncharged offense evidence pertaining to Duran's commission of domestic violence against Anita, including one incident in which Duran placed a pillow over her face for approximately 20 seconds, causing her to have difficulty breathing, and a separate incident in which he threatened to kill her. Duran raises no claim on appeal with respect to this evidence.

C. *The doctrine of invited error precludes review of Duran's claim that the trial court erred in failing to instruct the jury on count 3 regarding the lesser included offense of attempted criminal threat*

Duran claims that the trial court erred in failing to instruct the jury on count 3 regarding the lesser included offense of attempted criminal threat. In light of defense counsel's express objection to the court giving this instruction, we conclude that the doctrine of invited error precludes review of this claim.

1. *Factual background*

During a conference outside the presence of the jury, the prosecutor indicated that he was requesting that the trial court instruct the jury regarding "attempt as a lesser to Counts 1, 2, and 3. . . ." The court responded, "And I think it's not inappropriate. Certainly it's a lesser included to each of these Counts 1,2, 3, and the Court must give those lessers [*sic*] if there is some evidence to support an attempt." The following colloquy then occurred:

"The court: With respect to the attempts, do you have any objection to 'attempt' being given on Counts 1, 2, and 3, counsel?"

"[Defense counsel]: I do object. I do. I just — I submit to the Court. I just — I submit to the Court. I'm not sure if — if the evidence really supports an attempt. It seems to me it's either committed or wasn't committed.

"The court: Why don't you pull down that microphone.

"[Defense counsel]: I was going to say I would object. I don't know if the evidence supports the attempt. It seems to me that the offenses were either committed or not committed. I fail to see attempts in these particular situations, so I would be interposing an objection."

After discussing whether the court would provide a lesser included offense instruction with regard to count 1, the court told the prosecutor that it did not see any basis for providing a lesser included offense instruction for the crime of attempted criminal threat with respect to count 3, involving the threat to Donna S.. The prosecutor responded, "And I don't have a problem with the Court's position as to Count 3."

Later that afternoon, the court held another jury instruction conference with the prosecutor and defense counsel. With respect to the criminal threat charge in count 2, the court stated that it was aware of case law holding that the offense of attempted criminal threat may be established where the evidence is insufficient to support a finding that the victim actually suffered sustained fear. The court stated that with respect to count 2, "it could be argued this is an attempted . . . rather than a completed criminal threat."

Defense counsel responded:

"Again, just not to belabor the point, but all the elements, it seems to me, were proven by the prosecution, and I still don't understand what was thwarted in evidence that the jury could find this was an attempt. I fail to understand that."

Shortly thereafter, the court stated, "I will not give an attempt [instruction] as it concerns Donna S. [(count 3)], because in the Court's opinion, it either is or is not a threat against her. [¶] But I do believe that some of the statements that were made by [Anita] can certainly leave the jurors with a belief that while there may have been fear, there was not sustained fear on the part of [Anita] [(count 2)]."

After the court made additional comments clarifying that in the court's view, there was substantial evidence for the jury to alternatively find that Anita had been placed in

sustained fear by Duran's statement, the court indicated that it would provide a lesser included offense instruction regarding attempted criminal threat as to count 2. Defense counsel then stated, "The record will reflect it's over the defense's objection, but I don't think the evidence supports the giving an attempt."

2. *Governing law*

"[A] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction.' [Citation.]" (*People v. Horning* (2004) 34 Cal.4th 871, 905.)

However, mere unconsidered acquiescence to the trial court's action is not a sufficient basis on which to find invited error. (*People v. Horning, supra*, 34 Cal.4th at p. 905 ["The record here shows that defendant's 'lack of objection to the proposed instruction was more than mere unconsidered acquiescence.' [Citation.]"].) Rather, "[f]or the doctrine to apply, 'it must be clear from the record that defense counsel made an express objection to the relevant instructions.'" (*People v. Duncan* (1991) 53 Cal.3d 955, 969; see also *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264 ["invited error applies to an omitted instruction only if it is clear from the record that defense counsel made an express objection to the instruction in issue"], *People v. Matian* (1995) 35 Cal.App.4th 480, 484, fn. 4 ["Based on his on-the-record objection to any instructions on lesser included offenses, the instructional error would be deemed 'invited' and

therefore not cognizable on appeal]").) In addition, in order for the doctrine to apply, the record must be clear regarding the lesser included offense instruction to which defense counsel objected at trial. (*People v. Valdez* (2004) 32 Cal.4th 73, 115.)

In addition, counsel's choice must have been a deliberate and conscious one. (*People v. Cooper* (1991) 53 Cal.3d 771, 831.) In *Cooper*, the court explained that a tactical choice is one that is not made out of mistake or ignorance, reasoning: "If counsel was ignorant of the choice, or mistakenly believed the court was not giving it to him, invited error will not be found. If, however, the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice." (*Ibid*; accord *People v. Duncan, supra*, 53 Cal.3d at p. 969 ["because important rights of the accused are at stake, it must also be clear that counsel acted for tactical reasons and not out of ignorance or mistake." [Citation]]).)

3. *Application*

In this case, the prosecutor requested that the trial court instruct the jury on count 3 as to the lesser included offense of attempted criminal threat. The trial court indicated a tentative willingness to provide this instruction, noting that such an instruction was required if supported by substantial evidence. Defense counsel registered an express on-the-record objection to the trial court providing the instruction, and argued that there was an insufficient evidentiary basis for giving such an instruction. After hearing from defense counsel, the court indicated that it agreed that there was an insufficient evidentiary basis for the instruction. The prosecutor subsequently concurred in the court's assessment. (See pt. III.C.1., *ante*.)

From this record, it is clear that defense counsel's objecting to a lesser included offense instruction as to count 3 did not constitute mere unconsidered acquiescence. It is further clear that defense counsel did not act out of mistake or ignorance as to the trial court's intentions. Rather, defense counsel registered an express, deliberate, and considered tactical objection in the trial court to the giving of the same instruction that Duran now claims on appeal the trial court erred in failing to give. Moreover, the trial court acceded to defense counsel's request, after initially expressing a tentative inclination to provide the instruction.¹⁸

Under these circumstances, we conclude that the invited error doctrine precludes review of Duran's claim that the trial court erred in failing to instruct the jury on count 3 regarding the lesser included offense of attempted criminal threat.

D. *The sentences on counts 4 and 5 must be stayed pursuant to section 654*

Duran claims that the trial court erred in failing to stay execution of the sentences imposed for making annoying telephone calls (§ 653m, subd. (a)) (count 4) and violating a protective order (§ 273.6) (count 5) pursuant to section 654. Duran claims that the trial

¹⁸ In his reply brief, Duran notes that the trial court instructed the jury regarding the lesser included offense of attempted criminal threat as to count 2. However, Duran claims, "The trial court . . . appears to have inadvertently omitted instructing the jury on attempted criminal threats with count three involving [S]."

We disagree. Although neither Duran nor the People cite the relevant portion of the record on appeal, the record summarized in part III.C.1., *ante*, unequivocally indicates that the trial court did not act inadvertently. Rather, the trial court agreed with defense counsel that the evidence presented in the case did not support the giving of a lesser included offense instruction on attempted criminal threat with respect to count 3. However, the court concluded that the evidence supported giving such an instruction with respect to count 2, and accordingly provided the instruction, over defense counsel's objection.

court was required to stay execution of the sentences on both counts 4 and 5, because each count was connected in its commission with the offense of stalking (§ 646. 9) (count 1). The People concede the error.

Accordingly, we modify the judgment to stay execution of the sentences on counts 4 and 5.

IV.

DISPOSITION

The judgment is modified to stay execution of the sentences imposed on counts 4 and 5, pursuant to section 654. The trial court is directed to prepare an amended abstract of judgment reflecting this change and to deliver the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.